

Central Valley Flood Protection Board

In the Matter of Enforcement Action 2010-49

Encroachment Removal Enforcement Hearing for

Mr. Robert and Mrs. Carrie Jo Sieglitz

2817 Garden Highway, Sacramento, California

Mr. Robert Sieglitz and Mrs. Carrie Jo Sieglitz, Respondents

Central Valley Flood Protection Board Staff, Petitioner

PROPOSED DECISION AND ORDER

1.0 BACKGROUND

1.1 Summary of Encroachments:

The Executive Officer of the Central Valley Flood Protection Board (CVFPB or Board) sent an Encroachment Removal Enforcement Notice (Enforcement Action 2010-49) dated April 12, 2010, to Mr. and Mrs. Sieglitz (collectively hereinafter referred to as Respondent), property owners of 2817 Garden Highway, Sacramento, California. Enforcement Action No. 2010-49 directed removal of previously unpermitted encroachments and to backfill all voids located within 10-feet of the waterside levee toe on the left (east) bank levee of the Sacramento River. The referenced levee is a component of the Sacramento River Flood Control Project, an adopted plan of flood control. The encroachment violations listed in Enforcement Action No. 2010-49 are as follows:

1. Excavation of waterside levee toe to accommodate a storage unit.
2. Placement of a storage unit with metal roof within 10 ft from the waterside levee toe.
3. Placement of a boat and boat carrier within 10 ft from the waterside levee toe.
4. Placement of utility lines associated with the storage unit.
5. Placement of flushed concrete pad within 10 ft from the waterside levee toe.
6. Placement of fill material adjacent to the waterside slope.

Respondent's attorney, Thomas S. Knox, made a timely written request for a hearing dated May 27, 2010. The CVFPB conducted a Hearing on the matter on October 29, 2010.

1.2 Local Maintaining Agency:

Reclamation District 1000 (RD-1000) is the local maintaining agency (LMA) that has given assurances to the CVFPB to operate and maintain that portion of the Sacramento River Flood Control Project that is located inside their jurisdictional boundaries. Respondent's property is located within the boundaries of RD-1000.

1.3 Written Correspondence:

By letter dated October 10, 2008, the General Manager for RD-1000 informed Mr. Sieglitz that the cut into the waterside levee slope would require an engineering assessment to determine what action may be necessary to stabilize the levee before the coming flood season.

By letter dated October 18, 2008, Mr. Sieglitz responded to the General Manager of RD-1000 stating that the "cut" was not into the levee but rather into fill that was added against the levee slope over the years and the storage unit was outside of RD-1000's levee easement.

By letter dated March 16, 2010, the General Manager of RD-1000 responded to Mr. Sieglitz informing him that he was still in violation and RD-1000 would be working with the CVFPB to do an engineering assessment of the levee to determine the appropriate action to be done. The letter also noted that additional fill material had been imported on to the property that contained dirt, concrete, and other construction debris and such action requires a permit from the CVFPB. The letter directed Mr. Sieglitz to cease any more work at the site until a permit was obtained.

By letter dated April 12, 2010, the Executive Officer to the CVFPB sent an Encroachment Removal Enforcement Notice (2010-49) to Mr. Sieglitz.

By letter dated May 27, 2010, Respondent's attorney, Mr. Thomas S. Knox, made a written request for a Hearing before the Board concerning the enforcement action.

By letter dated September 03, 2010, the U.S. Army Corps of Engineers (USACE) notified the CVFPB that recent inspections had noted numerous encroachments that appear to be unpermitted in RD-1000 that may have a negative impact on structural stability, inspection, operations, maintenance and/or flood fighting activities. The USACE letter singled out the encroachment at 2817 Garden Highway saying that immediate attention by the CVFPB was required because the encroachment does impact the structural stability of the levee and is a deficiency that could prevent the flood control system from performing as intended during the next flood season. The USACE requested that the deficiency be corrected prior to the next flood season and failure to correct the deficiency would result in the RD-1000 – Natomas Basin System no longer being eligible for PL 84-99 rehabilitation assistance.

By letter dated September 20, 2010, the president of RD-1000 urged the CVFPB to take action in accordance with the Encroachment Removal Enforcement Order and the September 03, 2010 letter from the USACE.

By letter dated September 28, 2010, Board enforcement staff sent a Corrective Action Plan to the USACE indicating an anticipated completion date of June 16, 2010, for the removal of the referenced encroachment and restoration of the levee section.

1.4 Purpose:

The CVFPB held an Enforcement Hearing on October 29, 2010, to consider ordering removal of the encroachments and backfilling all voids within 10 ft of the waterside levee toe as listed in Enforcement Action 2010-49, pursuant to the Board's enforcement proceedings regulations.

2.0 LAW GOVERNING ENCROACHMENT ENFORCEMENT

2.1 Water Code:

The CVFPB has authority to enforce the erection, maintenance and protection of such levees, embankments and channel rectification as will, in its judgment, best serve the interests of the State. (Water Code, § 8534.) In addition, the CVFPB has authority to review plans of reclamation, flood control, drainage, improvement, dredging or work at on or near the Sacramento or San Joaquin Rivers, their tributaries, or adjacent lands subject to flooding. (Water Code, § 8710.) Discretion is vested in the CVFPB and its members to determine how and when its authority may best be carried into effect. (Water Code, § 8576.)

Pursuant to Water Code section 8708,

Whenever assurances shall have been given to the Secretary of War pursuant to Article 2 of Chapter 3 of this part, that the State will maintain and operate works after completion in accordance with regulations prescribed by the Secretary of War, it is unlawful for any person or public agency to in anywise interfere with or obstruct the performance of the maintenance or operation of such works, including, but not limited to, the encroachment upon any land, or right of way or easement thereon, acquired by the board for the maintenance or operation of any levee or other such works.

Pursuant to Water Code section 8709,

Any use of any such land, right of way, or easement in violation of the preceding section, whether for cultivation, planting of crops or trees, storage or disposal of material, or other encroachment upon, or use of such land, right of way, or easement which does or may interfere with or obstruct such operation or maintenance, constitutes a public nuisance, and the board may commence and maintain a suit in the name of the people of the State for the prevention or abatement of such nuisance.

2.2 Title 23 Regulations:

The October 29, 2010, hearing was initiated by the Executive Officer pursuant to the authority under the CVFPB's regulations governing Enforcement Proceedings, Title 23, Division 1, Chapter 1, Article 4, sections 20 through 22. Pursuant to Section 20(a),

The General Manager [subsequently re-titled as Executive Officer] may institute an enforcement proceeding by serving a notice by certified mail, return receipt requested, to the landowner or person (referred to hereafter as the "respondent") owning, undertaking or maintaining a work that is in violation of this division or threatens the successful execution, functioning or operation of an adopted plan of flood control.

The procedures for enforcement proceeding hearings are set out in Sections 21-22.

Pursuant to Section 22(b),

(b) The Board decision shall by order specify what action must be taken by the respondent, at respondent's cost, and the time within which such action must be taken. The required action may include, but is not limited to the following:

- (1) Removal of the work;*
- (2) Alteration of the work;*
- (3) Performance of additional work;*
- (4) Implementation of specified mitigation for effects on the environment;*
- (5) Compliance with additional reasonable conditions;*
- (6) Filing an application for a permit pursuant to this division;*
- (7) Revocation of the permit.*

The board decision may also give notice that if the respondent does not comply with the decision within a reasonable time, the board may take actions to abate violations or threats to the adopted plan of flood control, such as physical removal, and recover its costs from respondent.

2.3 Preparation of Proposed Decision and Bifurcation of Staff:

Board President Ben Carter closed the hearing and directed Board staff to prepare the record of evidence and a proposed decision based upon the record for consideration by the Board at a subsequent Board meeting. The CVFPB may accept, reject or alter the proposed decision at that time. CVFPB enforcement staff was bifurcated from the Board for purposes of this hearing. Gary Lemon, staff engineer and Deborah Smith, Board legal Counsel, were directed to serve as independent staff to draft the proposed decision. The record of evidence, including the transcript of the October 29, 2010, hearing and all admitted exhibits, are available on the Board's website at <http://www.cvfpb.ca.gov>, or upon request by contacting Mr. Lemon at (916) 574-0649.

3.0 SUMMARY OF EVIDENCE PRESENTED TO THE BOARD

3.1 Petitioner:

CVFPB staff senior engineer Ali Porbaha, P.E., made a presentation to the CVFPB and submitted the following exhibits as evidence into the record:

Exhibit 1. Staff Report dated October 29, 2010 with recommendation to approve Enforcement Action 2010-49 and to make a finding that the encroachment removal is exempt from the California Environmental Quality Act (CEQA).

Exhibit 2. The Staff Report contained the following attachments:

1. Attachment A: Encroachment Removal Enforcement Notice dated April 12, 2010;
2. Attachment B, Exhibit A: RD-1000 letter dated October 10, 2008 notifying respondent of encroachment issue;
3. Attachment B, Exhibit B: Respondent letter to RD-1000 dated October 18, 2008, responding to encroachment issue;
4. Attachment B, Exhibit C: RD-1000 letter to respondent dated March 16, 2010, reaffirming RD-1000's position on the encroachment issue and notifying the respondent that recently imported material required a permit from the CVFPB;
5. Attachment B, Exhibit D: Letter from the USACE to the CVFPB dated September 03, 2010, recommending immediate action to remove the encroachment prior to the upcoming flood season or RD-1000 – Natomas Basin system will no longer be eligible for USACE's PL 84-99 rehabilitation assistance program;
6. Attachment B, Exhibit E: CVFPB letter to the USACE dated September 28, 2010, presenting a Corrective Action Plan for unauthorized encroachment at 2817 Garden Highway, Sacramento, CA;
7. Attachment B, Exhibit F: RD-1000 letter to CVFPB dated September 20, 2010, urging CVFPB to take action concerning this issue;
8. Attachment B, Exhibit G: Letter from Respondent's attorney, Mr. Thomas S. Knox, dated May 27, 2010, requesting an enforcement hearing before the CVFPB;
9. Attachment B, Exhibit H: CVFPB letter to Mr. Knox dated June 2, 2010, acknowledging hearing request;
10. Attachment B, Exhibit I: CVFPB letter to Mr. Robert and Mrs. Carrie Jo Sieglitz dated October 07, 2010, informing them that the hearing has been scheduled for October 29, 2010, at 8:30 AM;
11. Attachment C: USACE Periodic Inspection Report No.1 dated January 2010;
12. Attachment D: Drawings from topographic survey that was done at 2817 Garden Highway by Psomas dated June 02, 2010;
13. Attachment E: CVFPB exhibits prepared by staff using plan view and cross sectional views taken from the Psomas survey to show flood control easements;
14. Attachment F, Exhibit A: 1913 RD-1000 Easement Deed Book 371 Page 404;
15. Attachment F, Exhibit B: Joint Use Agreement between RD-1000 and

CVFPB dated June 26, 2009;

16. Attachment G, Exhibit A: 1952 USACE As-Constructed drawings for the Sacramento River Flood Control Project from Sacramento to Vernon;

17. Attachment G, Exhibit B: As-Constructed drawings for Sacramento Urban Area Levee Reconstruction Project dated February 07, 1991.

Exhibit 3. Power Point Presentation – Board enforcement staff made a power point presentation before the Board at the hearing.

Oral testimony and argument was provided by Ali Porbaha, senior staff engineer, and Angeles Caliso, staff engineer (staff). Oral testimony was also provided by supervising staff engineer Curt Taras, Executive Officer Jay Punia; staff legal counsel Robin Brewer; and Assistant Chief Counsel for the Department of Water Resources, Ward Tabor, acting as legal counsel to Board staff. The full testimony is stated in the October 29, 2010 transcript of the enforcement hearing.

3.2 Respondent:

Attorney Thomas S. Knox, representing Mr. Robert and Mrs. Carrie Jo Sieglitz, made a presentation to the CVFPB and submitted the following exhibits into the record:

Exhibit 1. Letter dated October 29, 2010 to Board members from the Respondents attorney, Mr. Thomas S. Knox, summarizing the response by Mr. and Mrs. Sieglitz to the claims made by the CVFPB staff report in connection with this matter.

Exhibit 2. The letter from Mr. Knox described above contained the following attachments:

1. Attachment A: 1913 RD-1000 Easement Deed Book 371 Page 404;
2. Attachment B – A Vicinity map used to identify four properties along the Garden Highway near the respondent's property at 2718 Garden Highway. The map was used as an index map to show where the respondent measured the waterside slope of the levee along the Garden Highway;
3. Attachment B, Exhibit A: Photograph showing the waterside slope measurement made at the 2100 block of the Garden Highway;
4. Attachment B, Exhibit B: Photograph showing the waterside slope measurement made at Sand Cove near the Garden Highway;
5. Attachment B, Exhibit C: Photograph showing the waterside slope measurement made near marina up from Orchard Road along the Garden Highway;
6. Attachment B, Exhibit D: Two photographs showing the waterside slope measurement made near Chevys along the Garden Highway;
7. Attachment C: Copy of Reclamation Board Encroachment Permit No. 11636-A that was issued on August 25, 1978, to Ralph G. Marston and Robert A. Sieglitz. The permit authorized the applicants to reinforce and reclaim eroded bank with concrete, stone, masonry and bituminous, located on the left bank of the Sacramento River, 0.8 mile downstream from San Juan Road; Unsigned

conditions, covenant, and restrictions document associated with Department of the Army Permit No. 6624;

8. Attachment D: Department of the Army Application/Permit No. 6624 dated June 20, 1978, applicant Robert A. Sieglitz. The applicant was requesting approval to place riprap in Sacramento River at river mile 64.1;

9. Attachment E: Two typical levee cross section drawings taken from the Post-Authorization Change Report and Interim Re-evaluation Report, American River Watershed, Common Features Project, Natomas Basin, Sacramento and Sutter Counties, California, dated July 2010.

Oral testimony and argument was provided by Mr. Knox and Mr. Sieglitz. The full testimony from Mr. Knox and Mr. Sieglitz is stated in the October 29, 2010 transcript of the enforcement hearing.

3.3 Agency Testimony In Favor of the Enforcement Action:

Oral testimony was provided by Mr. Paul Devereux, General Manager for RD-1000, and Mrs. Megan Nagy, Chief of the Flood Protection and Navigation Section, USACE. The full testimony of both agency representatives is stated in the October 29, 2010 transcript of the enforcement hearing.

4.0 PROPOSED DECISION AND FINDINGS

4.1 Proposed Decision:

The proposed decision is for the CVFPB to order Respondent to remove the following encroachments:

- Two Conex storage containers (Item 2 in Enforcement Notice 2010-49)
- Metal roof with grass cover located above the Conex storage containers (Item 2)
- Utility lines associated with the storage unit (Item 4)
- Flushed concrete pad associated with the storage unit (Item 5)
- Fill material adjacent to the waterside slope/second driveway (Item 6)

However, Respondent shall not be responsible for reconstructing the levee to a 3:1 slope.

The moveable trailers and vehicles on the waterside slope may remain so long as they are easily moveable.

4.2 Findings:

The Board adopts the staff report as its findings in this enforcement action and expressly incorporates the staff report by reference into this proposed decision, except for the following sections:

- Page 4: “The levee toe was cut in order to accommodate the two Conex containers (see Attachment E). This is a violation of the Board’s Regulations Section 112(b), which states that *“banks, levees, and channels of floodways along any stream, its tributaries, or distributaries may not be excavated, cut, filled, obstructed, or left to remain excavated during the flood season.”*
- Page 4-5: “The current waterside levee slope is almost near vertical as a result of the levee toe cut. This is a violation of the Board’s Regulations Section 120(a)(24), which states that *“the finished slope of any project levee construction or reconstruction must be three (3) feet horizontal to one (1) foot vertical, or flatter, on the waterside and two (2) feet horizontal to one (1) foot vertical, or flatter, on the landside of the levee.”*
- Page 5: The Board does not adopt the third bullet point of Item I regarding Title 23 Section 133(a) as it relates to the levee cut or boat carrier. However, the Board does adopt this paragraph as to the Conex containers.
- Page 10: The Board does not adopt Item III as it relates to the boat carrier. However, the Board does adopt Item III as to the two Conex containers and metal roof.

For the reasons described in the staff report, the Board finds that these encroachments violate several sections of the Title 23 regulations, including the following:

<u>Encroachment Item</u>	<u>Regulation Sections Violated</u>
Conex containers (Item 2)	6, 112(a), 133(a), 137(i)
Metal Roof (Item 2)	6, 112(a), 133(a), 137(i)
Utility Lines (Item 4)	6, 112(a), 133(a), 137(i)
Concrete Pad (Item 5)	6, 112(a), 133(a)
Fill material/driveway (Item 6)	6, 112(a), 115(a), 116(b)(6), 130(c)(1), 130(c)(3), 133(a)

In addition, the Board makes the following findings:

1. The items listed above in section 4.1 violate Water Code sections 8708-8709 and therefore constitute a public nuisance.

As stated above, the encroachments listed in section 4.1, above, are located on a component of the Sacramento River Flood Control Project (SRFCP), an adopted plan of flood control. The State has provided assurances to the United States that the State will maintain and operate the SRFCP in accordance with federal regulations. Based on oral and documentary evidence provided by Board

staff, Mr. Devereux of RD-1000, and Ms. Nagy of USACE, the encroachments interfere with and obstruct inspection, operation, and maintenance of the federal project levee. For example, the encroachments obstruct inspection and block the view of the levee slope. In addition, the encroachments are not firmly secured and are not easily moveable during a flood event. In contrast, the trailers and vehicles on the waterside of the levee are easily moveable and therefore do not obstruct inspection operations.

2. The items listed above in section 4.1 threaten the successful execution, functioning or operation of an adopted plan of flood control.

For the same reasons as stated in paragraph 1, as well as the reasons stated in the staff report, the Board finds that the encroachments threaten the successful execution, functioning or operation of an adopted plan of flood control.

3. Respondent has not obtained a permit for any of the encroachments listed above in section 4.1, as required by Water Code section 8710 and Title 23 Section 6.

Water Code section 8710 and Title 23 Section 6 prohibit Respondent from constructing or maintaining encroachments without first obtaining a permit from the Board. Here, no permits were obtained for any of the encroachments listed in section 4.1, above. Mr. Sieglitz acknowledged that no permits have been issued for these items. Mr. Sieglitz testified that he installed the storage boxes in 1992 not thinking he needed an encroachment permit because the boxes were movable and not permanent. Mr. Sieglitz acknowledged that he probably should have gotten a permit for the fill that was imported for the secondary driveway, but stated that the boat/boat carrier is movable and as such should not require a permit. Water Code sections 8608 and 8719 state that the maintaining of encroachments without the permission of the Board and in violation of the Board's regulations constitutes a public nuisance subject to abatement.

4. Mr. Sieglitz should not be responsible for restoring the levee to design grade because the evidence supports a finding that the levee slope was not altered by Mr. Sieglitz.

The testimony provided at the October 29, 2010 Enforcement Hearing was indeterminate regarding when the levee slope had changed from design grade conditions. Mr. Sieglitz acknowledged digging a "walkway" between the boxes and the levee slope, but testified that the material removed was composed of clay, broken concrete and other material that is not indicative of the levee, which is made mostly of sand. Mr. Sieglitz indicated that several other properties along Garden Highway do not have a 3:1 slope, as is typical for waterside levee slopes, suggesting that the levee slope had been altered over the years.

4.3 Legal Issues Raised By Respondent:

4.3.1 Statute of Limitations

Respondent argues that the ten-year statute of limitations in California Code of Civil Procedure section 315 bars this enforcement action. The Board finds that the action is not barred by Code of Civil Procedure section 315. First, civil statutes of limitations do not apply to administrative proceedings. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1088-1089.) Second, the statute of limitations is not a defense to an action against a public nuisance. (Cal. Civ. Code, § 3490.) Finally, this is an enforcement action involving land dedicated to public use. (Code Civ. Proc. § 1007; *People v. Chambers* (1951) 37 Cal.2d 552, 556-557.) For these reasons, the enforcement action is not time-barred.

4.3.2 Easement

Respondent argues that the encroachments, including the Conex storage boxes and driveway, are not prohibited by the SSJDD easement (Respondent's Exhibit 2, Attachment A) and therefore may remain. The Board disagrees with Respondent's narrow interpretation of the easement. Moreover, the easement does not negate Respondent's obligation to comply with Title 23 and the Water Code. As discussed above, the Board finds that these encroachments violate Title 23 and Water Code sections 8708-8709, as well as threaten the successful execution, functioning, operations, or maintenance of an adopted plan of flood control.

4.3.3 Interpretation of Regulations

Respondent argues that Title 23 Section 133(a) can only apply to requirements enacted by RD 1000 pursuant to statute or regulation under the Administrative Procedure Act (APA). The Board disagrees with Respondent's interpretation. Section 133(a) does not seek to enforce a rule of general application, but rather the specific maintenance requirements of RD 1000 as to Respondent's property.

With respect to the driveway, Respondent argues that the term "orientation" in Title 23 Section 133(c)(1) includes composition, as well as alignment. Respondent also argues that a driveway is a "similar structure" to fences or walls, and is therefore allowed pursuant to Title 23 Section 133(c)(3). Respondent's interpretation of these two sections is contrary to the plain language and intent of the regulations.

5.0 SUMMARY AND ORDER

The proposed summary and order is as follows:

1. The Board finds that the following encroachment violations listed in the Encroachment Removal Enforcement Notice for Enforcement Action 2010-49 violate California Code of Regulations Title 23, Waters, Division 1 and Water Code sections 8708 and 8709, as well as threaten the successful execution, functioning, operations, or maintenance of the left (east) bank levee of the Sacramento River Flood Control Project at 2817 Garden Highway:

Item 2: Placement of a storage unit (two Conex storage containers) with metal roof within 10 ft from the waterside levee toe.

Item 4: Placement of utility lines associated with the storage unit.

Item 5: Placement of flushed concrete pad within 10 ft from the waterside levee toe.

Item 6: Placement of fill material adjacent to the waterside slope.

2. The CVFPB hereby orders Respondent to remove all encroachments and appurtenants listed in paragraph #1 (Items 2, 4, 5, 6) at his own expense within 120 days of adoption of this order by the CVFPB. Further, Respondent shall comply with all Enforcement Conditions attached to the Encroachment Removal Enforcement Notice for Enforcement Action 2010-49 dated April 12, 2010, except that Respondent shall not be required to comply with condition #5 (restore the slope of the levee to a 3:1 slope). Restoration of the encroachment removal sites associated with the concrete pad, utility lines, and the fill material shall be completed in accordance with the specifications found in California Code of Regulations Title 23, Division 1, Article 8, Section 120 Levees, which are summarized in the Enforcement Conditions. In addition, the CVFPB or any of its staff may make reasonable inspections before, during, and after removal and may request in writing at any time any reports or data, including but not limited to a description of all work done. Respondent shall provide all such requested information within the timeframes requested by the CVFPB or its staff.

3. If Respondent does not comply with this order within 120 days of adoption by the CVFPB, the CVFPB may take actions to abate the encroachments listed in paragraph #1 (Items 2, 4, 5, 6), such as physically removing them using a contractor or the local maintaining agency, and recover its costs from Respondent. In addition, the CVFPB has the authority to seek judicial enforcement and commence and maintain a suit in the name of the State for the prevention and abatement of the nuisance.

4. The CVFPB hereby dismisses item # 1 of Enforcement Action 2010-49. Therefore, Respondent is not responsible for returning the waterside levee slope to design grade.

5. The CVFPB hereby dismisses item # 3 of Enforcement Action 2010-49. The trailers and vehicles on the waterside of the levee may remain so long as they are easily moveable.

6. The CVFPB, acting as lead agency, finds that this decision and order is categorically exempt from the California Environmental Quality Act (CEQA) in accordance with CEQA Guidelines Section 15321 under Class 21(a), actions of regulatory agencies to enforce standards or revoke a permit to enforce standards, and Section 15301 under Class 1, minor alteration of existing public or private structures and facilities.